September 23, 1970

Enclosed is a draft that we can use as a basis for discussion. It is for your eyes only and should not be copied.

As I was finishing it, someone gave me a copy of a book by Miles Copeland, The Game of Nations. It is about big power politics in the Near East, and Copeland had had official access to classified information. I believe he was a State Department employee and assigned to the Mid East.

He must have been concerned about the espionage laws for in the preface to his book he sets the stage for a defense, e.g.--

Free Speech - Education

"I think our citizens should know what it is they are admiring--or despising or complaining about--however they happen to feel about our Government."

"I have been guided only by my central objective: to acquaint the readers, and future historians, with a facet of our Government's handling of its foreign affairs."

Free Speech - Correcting Misrepresentations

"I doubt that intelligent citizens really take comfort from the [official line]... Our statesmen are not the Pollyannas they try to appear to be in their published accounts of themselves. They would not be where they are if they were not fully aware of what a generally amoral world we live in..."

No Conspiracy

"I wish to emphasize that this is entirely a personal account..."

Arthur Strout

All the Information is Public

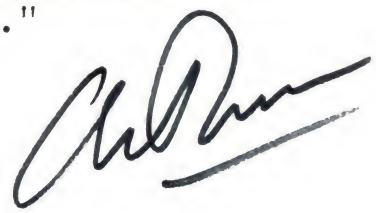
"I have omitted information that is protected by [security regulations] except where it is already in the hands of foreign powers because of previous leaks through espionage channels... or because of exposes by journalists."

No Intent to Prejudice the United States

"While our citizens may take pride in the solid front of high morality that our nation presents, they can also sleep more easily at night knowing that behind this front we are in fact capable of matching the Soviets perfidy for perfidy."

Not Discussing the Specific of National Defense

"[This book] is intended to reveal general truths about the relations between great powers..."



DRAFT
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DO NOT REPRODUCE

MEMORANDUM OF LAW

A. THE FACTS

A person unknown to me has copies of certain documents about the nature and sources of the Viet Nam war. The documents were copied from a stdy made by the Defense Department about ____ years ago. Some or all of them may be classified defense information. The person had access to these documents while an employee of the executive branch of the government, and he made the copies at that time. He has since left the government, taking the copies with him, and he has now approached others and offered access to the documents. They would like to quote excerpts from the documents in their writings of historical and political analysis.

← The question that has been asked is what risks are being run if the contents of the documents are made public.

B. THE LAW

The basic administrative rules dealing with the dissemination of classified information are set forth in Executive Order 10501. Section 7(b) states that "Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is

proposed to be made may have been solely or partially responsible for its production." The release now contemplated would probably be a violation of the Order.

However, an unauthorized disclosure of classified information is not necessarily a crime. About the only safely predictable consequence is that if the disclosure is made by a government employee who came by the information in the course of his duties, he will lose his security clearance and his job.

Factors in addition to disclosure must be present to warrant a conviction for violation of the criminal law.* The criminal statutes, which are discussed below, do not fit together as parts of a unified scheme. They were passed at different times; they sometimes overlap; and to a large degree they set general standards rather than rigorously defining the prohibited acts.

While they do not blanket the area of release of classified information and make every such release a crime - they probably come close to doing that, and a person who intentionally releases classified information to an unauthorized person must at his peril know both the nature and source of the information released.

There are two main groups of statutes (1) those where a release of information is by itself criminal because of the nature of the information, and (2) those where other elements must be proved if there is to be a conviction - elements such as an intent to prejudice the United States or

to advantage a foreign nation, or a demonstrable relationship of the information released to the national defense.

This memorandum deals with the statutes most directly involved and upon which - on the basis of history - a prosecution would most likely be instituted. I have not discussed such statutes of general applicability [redacted] as those dealing with treason, seditiion and subversive activities. 1/ Although there exists the theoretical possibility that they [redacted] would be applied, prosecution under them would generally present the government with more difficult tasks then would prosecution under the statutes I have discussed.

1. Situations Where the Release of the Information is Criminal

Information classified as Restricted Data by the Atomic Energy Commission. A knowing and unauthorized disclosure of Restricted Data by an employee [redacted] of the government is a misdemeanor, and the employee or any person who conspires to receive or communicate such data is punishable by a fine of up to $2,500. 2/ Unauthorized disclosure

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1/ 18 U.S.C. §§2381 et seq.

2/ 42 U.S.C. §2277. It is not clear whether the statute would, by application of its conspiracy phrase, apply to any person having possession of such data. It probably would not apply to release by a single person who came by the information innocently, but it might well be applied if two people (whether or not government employees) act in concert to effect a release of the information.

or attempted unauthorized disclosure of Restricted Data "with intent to injure the United States or with intent to secure an advantage to any foreign nation" is a capital offense. 1/ Unauthorized disclosure with "reason to believe" that the information will be so used is a felony carrying a penalty of up to 10 years and/or a $10,000 fine. 2/

Classified information about codes or obtained by communications intelligence. Section 798 of Title 18 makes it a crime to knowingly publish or communicate to an unauthorized person (or use in a manner prejudicial to the interests of the United States) classified information concerning codes, ciphers or cryptographic systems of the United States or any foreign government; concerning any apparatus used for cryptographic or communications intelligence of United States or a foreign government; concerning the communications intelligence activities of the United States or a foreign government; or obtained by the process of communications intelligence from the communications of any foreign government. The penalty provided is up to 10 years of imprisonment, or a fine of up to $10,000 or both. Conviction under the statute ~~has the effect of removing from the jury the questions of whether~~ does not require a showing that the information is defense information ~~and whether~~ or that there is an intent to injure the United States or advantage another. 3/

1/ 42 U.S.C. §2274(a). See also 42 U.S.C. §2275, which subjects a person acquiring or attempting to acquire such information, with an intent to injure the United States or advantage a foreign power, to imprisonment for 20 years, or a fine of $20,000 or both. A similar penalty can be imposed upon one who tampers with restricted data, with the prohibited intent. See 42 U.S.C. §2276.

2/ 42 U.S.C. §2274(b).

3/ Compare sections 793 and 794 of Title 18, below.

Release of a diplomatic code, matter prepared in diplomatic code or matter which purports to have been prepared in any such code, by any person who obtained the information by virtue of government employment is a felony carrying a penalty of up to ten years in jail or a $10,000 fine or both. See section 952 of Title 18 of the United States Code. It should be noted that conviction under this statute doesnot necessarily require that the information be classified. 1/

Communication of classified information to a foreign agent. Section 783(b) of Title 50 makes it a crime for a government employee to transmit information classified as affecting the security of the United States to a person he knows or has reason to believe is a representative of a foreign government or a member of a Communist organization. The penalty is up to 10 years imprisonment or a $10,000 fine, or both. The courts have held that under this statute a relationship between the material and national defense need not be proved; it is enough to show that the material is classified. Scarbeck v. US., 317 F. 2d 546 (D. C. Cir. 1962 and 1963).

1/ The statute also applies to information obtained while in the process of transmission between a foreign government and its diplomatic mission in the United States.

Removal of documents from a government file. Section 2071 of Title 18 of the United States Code makes it a crime punishable by a three year prison term, or a $2,000 fine, or both, to conceal, remove, obliterate or destroy documents from a government file. In using the word "remove" the statute appears on its face to be proscribing a removal for the purpose of altering the files, that is a permanent removal. However, Judith Coplon was charged under the statute and the case reports are consistent with an interpretation that she removed the papers only for the purpose of making copies and replaced them after the copies were made. 1/

Violation of certain Defense Department regulations. Section 797 of Title 50 provides that whoever wilfully violates a lawful security regulation of the Defense Department for the security of military facilities or military property, or access thereto, is subject to a penalty of up to one year injjail or a $5,000 fine, or both. The regulation must be prominently posted.

Divulging of certain confidential information by a government employee. Section 1905 of Title 18 makes it a misdemeanor for a government employee to divulge confidential information relating to "trade secrets, processes, operations, style of work, or apparatus, or to the

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1/ Coplon v. United States, 191 F. 2d 749 (D. C. Cir. 1951), cert. denied, 342 U.S. 926 (1952); see also United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952). This particular point apparently was not litigated in the Coplon cases.

identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association; or permits any income return or copy thereof" to be seen except as provided by law. The penalty imposed can be up to a year in jail or a $1,000 fine, or both. This statute appears to be aimed at disclosure of private sector information that could be used by competitors.

2. Administrative Sanctions That Can Be Applied Against A Government Employee Who Makes An Unauthorized Disclosure Of Classified Information.

Section 7532 of Title 5 gives agency heads (including State and Defense) the right to suspend employees "in the interests of national security," and Executive Order 10501 (as amended) 1/ provides that (section 19) "the head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case." Stringent administrative action means revocation of security clearance and immediate suspension

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1/ See 50 U.S.C. §401.

without pay, subject to a right of review and a hearing. 1/

However, an unauthorized disclosure of classified information does not necessarily subject either the government employee, or any other person, to criminal penalties. To become criminal, factors other than simply unauthorized release must be proved. 2/

3. The Espionage Laws

The main statutes dealing with disclosure of defense information are the espionage laws, particularly sections 793 and 794 of Title 18 of the United States Code. 3/ In reviewing these statutes, it must be remembered that whether or not information is classified is not a test.

1/ See also E.O. 10450; Cole v. Young, 351 U.S. 536 (1956), and Sections 204 and 205 of E.O. 11222.

2/ Section 8312 of Title 5 of the United States Code strips retirement benefits from any government employee convicted of violating the following statutes, inter alia: 18 U.S.C. 793 (gathering, transmitting or losing defense information); 18 U.S.C. 793 (gathering or delivering defense information to aid a foreign government); and 18 U.S.C. 798 (disclosure of classified information). The statute imposes the same penalty on one convicted of treason, sabotage, seditious conspiracy, and similar offenses. However, a release of information that is only a violation of regulations or of some criminal act of less stature does not result in loss of benefits.

3/ See also 18 U.S.C. §798, above.

Section 793 of Title 18, makes it an offense, inter alia, to transmit or receive (or to conspire to do so) information relating to the national defense when there is reason to believe that the information could be used to the disadvantage of the United States or to the advantage of a foreign power. The penalty is up to 10 years in prison, or a $10,000 fine, or both.

The two main questions raised by the statute are (1) whether the information is defense information and (2) whether the alleged violator had knowledge that the information could be used to disadvantage the United States or to the advantage of a foreign power.

Both of these questions would be jury questions, as the Supreme Court ruled in 1941. Gorin v. United States 312 U.S. 19, [redacted]. In Gorin, Salich (a naturalized Russian born citizen) obtained for Gorin (a USSR citizen and agent) from United States government intelligence files, reports which detailed the coming and going of Japanese military and civil officials on the U.S. West Coast, gave some information about the movement of Japanese fishing boats that were suspected of espionage, and gave some information about the photographing of U.S. war vessels.

Gorin and Salich contended that this information was too general to be deemed information connected with the national defense, as used in the espionage acts. Any other interpretation, they argued, could violate the free speech provisions of the Constitution, and they argued that the

statute, in effect, should be limited to cases involving the disclosure of military [redacted] information, codes, troop movements and the like. The Court rejected that approach and said that the words "national defense" have "broad connotations, referring to the military and naval establishments and the related activities of national preparedness" (at 28), though "the connection must not be a strained and arbiting one, the relationship must be reasonable and direct." (p. 31) The convictions were affirmed.

← There were no dissents. The opinion was written by Justice Reed. The Court at the time consisted of Hughes, McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy (who did not take part in the case).

In at least one case the connection of material to national defense has been established solely by the testimony of a military officer. Schackow v. Canal Zone, 108 F. 2d 625 (5th Cir. 1939). The officer testified that the information obtained could be used against the safety of the Canal Zone, and this was deemed sufficient to put the case to the jury.

Section 794(a) of Title 18 makes it a capital offense to transmit information relating to national defense to a foreign power with an intent or reason to believe that the information will be used to the disadvantage of the United States or to the advantage of a foreign power. It is not clear that a general publication of such information would come within the statute. However, the statute speaks of "communicates" "either directly

or indirectly," and a general publication would probably be sufficient if the requisite state of mind could be shown. One argument against the sufficiency of a publication is the fact that subsection (b) of the statute (which provides the same punishment in time of war when the information "might be useful to the enemy,") specifically lists "publishes" among the prohibited acts. The omission of that word in section (a) may therefore be of some significance. Subsection (c) subjects conspirators to the same penalty.

It is this statute under which the Rosenbergs were prosecuted.

4. The Bribery Laws

It is vital that no payment of any kind pass or be offered to a government official releasing information. Otherwise, he and the payor will be open to prosecution under the bribery statute or the statute involving a conspiracy to bribe.

Section 201 of Title 18 provides, in part, that "whoever, directly or indirectly, corruptly gives, offers or promises anything of value t o any public official... with intent... to induce such public official,... to do or omit to do any act in violation of his lawful duty.... Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both...." 1/

There are various other situations to be watched (1) receiving pay from another source, (2) theft of government property or particular agency

1/ Similar penalties are imposed on the official who asks, seeks, or accepts any payment.

5. The General Conspiracy Law

Section 371 of Title 18 punishes a conspiracy to commit an offense against the United States or to defraud the United States. However, the object of the conspiracy must be the commission of an act that is made a crime by statute. 1/ Accordingly, a joint effort to make public classified information is not necessarily a conspiracy, for if the only violation to be committed is the disregard of an executive order, there is no conspiracy to commit an offense. 2/

The trap of the conspiracy statutes is that if one of the conspirators will commit a crime if the conspiracy is carried out, all participants could be subject to a conspiracy prosecution. Thus, if a government employee is a conspirator, and if certain acts are made illegal by virtue of his employment, all involved are liable to conspiracy prosecution.

What is a conspiracy? There is no clear definition. A chain of separate events is not a conspiracy. A conspiracy requires joint action to effect an end and it requires overt acts. The more contact there is between parties, the more likely it is that a conspiracy can be proved. The existance of joint control of a venture or of shared profits would probably be enough to get the case to a jury.

1/ Whether the conspiracy is a misdemeanor or a felony depends upon its object. If the crime to be committed is a felony then so is the conspiracy, but if the crime to be committed is a misdemeanor, then so is the conspiracy.

2/ See, e.g., Heike v. United States, 192 F. 83 (2nd Cir. 1911).

However, since the espionage statutes carry their own conspiracy sections, the general conspiracy statute probably does not substantially increase the risk of prosecution involved in releasing defense information.

C. SOME ANCILLARY CONSIDERATIONS

The government has greater power of investigation in cases related to national defense than in ordinary criminal cases. Under section 2516 of Title 18, the government may legally wiretap and eavesdrop when there is reason to believe that there are violations inter alia of Sections 2274 through 2277 of Title 42 (Atomic Energy data disclosure) or ~~under~~ of Chapter 37 (espionage), Chapter 105 (sabotage), Chapter 115 (treason) or Section 201 (bribing of public officials) of Title 18.

There are also two immunity statutes. Under Section 2514 of Title 18, immunity may be granted to a witness in cases involving the above violation. Accordingly, 5th Amendment protections are removed. Section 3486 grants a similar exemption in order to compel testimony before committees of Congress and the Courts.

Once the government has reason to believe that there is a violation of the espionage laws, it is almost certain that wiretaps and listening devices will be widely used.

D. CONSTITUTIONAL LIMITATIONS

The statutory pattern set forth above shows that release of some classified information is illegal per se and that release of other

information is illegal when it is defense information that may disadvantage the United States or advantage a foreign power.

The espionage statutes leave the resolution of most of the critical questions raised by the statutes to the jury. A jury judgment on any particular fact is hard to predict - the political climate at the time of the deliberation is a factor that can easily influence a decision. There is no case law giving useful guidelines as to the minimum amount of information that must be presented to the jury if the judge is to permit the case for deliberation. Accordingly, the risks of any information disclosure are substantial and as is shown above, the penalties upon conviction can be great.

However, all of the statutes are tempered by the Constitution, and here the freedom of speech provisions of the First Amendment may sanction certain disclosures that might otherwise be within the scope of the statutory language.

"The character of every act depends on the circumstances in which it is done...and the question in every case is whether the words used are such as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 1/

1/ Schenck v. U.S. 247 U.S. 47 (1919) - involving affirmance of a conviction under the espionage laws. The conviction was for conspiracy to obstruct the draft laws by the first world war. See also Abrams v. U.S., 250 U.S. 616 and Schaefer v. U.S., 251 U.S. 466, where Holmes and Brandeis dissented from affirmance on the ground that there was no showing of a clear and present danger.

If it can be established that the purposes of the release of defense information is to promote a constructive debate on the propriety of a national program, and if the release could not have a direct adverse effect on a military operation or interfere directly with a specific diplomatic plan, the disclosure should be constitutionally protected. 1/

In my judgment, any release should be made only to provide factors that will add to an ongoing national debate or stimulate a national debate. That having been done, there is a reasonable chance of obtaining an acquittal on constitutional grounds if a prosecution is brought. A Brandeis dictum is pertinent - as philosophy if not as law: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not silence." 2/

The free speech cases would be most helpful if a general violation of the espionage laws was being litigated - one where the courts (judge or

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1/ The question of whether there is a clear and present danger is one of law, for the court to decide. The clear and present danger test took a judicial beating in the communist cases of the 1950s (see, e.g., Dennis v. U.S., 341 U.S. 494 (1951). Those cases can best be read as ones where there was an organized conspiracy to effect an illegal end - overthrow of the government. These cases posed two factors that perhaps account for the decisions - (1) clandestine activity and (b) an attempt to change the form of government, not an attempt to stimulate thought that might effect a change within the processes contemplated by the existing system. Substantial weight was placed on the latter by the courts.

2/ 341, U.S. 123 495, 586.

jury) had to measure the harm that could come to the nation. However, where Congress had decreed specific acts to be criminal, the Dennis line of cases might be more likely applied. For it would be much easier for a court to apply the free speech test to sanction acts not specifically forbidden than to use it to prevent enforcement of a specific intent of Congress as expressed by statute.